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September 24, 2013

<u>Filed via ECF</u>
Michael E. Gans, Clerk of the Court
U.S. Court of Appeals for the Eighth Circuit

Re: *Ronald Tussey et al. v. ABB, Inc. et al.*,
       Nos. 12-2056, 12-2060, 12-3794, 12-3875
       Before: Judges Riley, Bright, and Bye (Division II, St. Louis)
       Argued September 24, 2013
       Response to ABB's Notice of Supplemental Authority

Dear Mr. Gans:

   At the argument this morning, ABB' attorney directed the Court to *Ringwald v.*

Prudential Ins. Co. of Am., 609 F.3d 946 (8th Cir. 2010), as supplemental authority.

ABB did not cite that case in its opening or reply briefs. Under FRAP 28(j) we

submit this response to that citation.

   ABB contends *Ringwald* supports its contention that the Investment Policy

Statement (IPS) in this case is not one of the "documents and instruments

governing the plan" under ERISA's fiduciary standards statute—29 U.S.C.

§1104(a)(1)(D). That is incorrect. First, *Ringwald* does not concern an IPS or

§1104(a)(1)(D). Second, *Ringwald* is not a fiduciary breach case arising under 29

U.S.C. §1132(a)(2). It is a benefits claim case under 29 U.S.C. §1132(a)(1)(B). It thus

does not concern a claimed breach of ERISA's fiduciary standards statute (29 U.S.C.

§1104). For the reasons stated in our brief, the *Firestone* deference standard for

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benefits claim cases at issue in *Ringwald* does not apply to fiduciary breach cases.

Plaintiffs' Brief 31–37.

Moreover, *Ringwald* applies *de novo* review, instead of the *Firestone* deference

ABB seeks. The Court held a summary plan description (SPD) cannot provide a

fiduciary the interpretative discretion that is the prerequisite to *Firestone*

deference, where the document establishing the plan does not. 609 F.3d at 948–49.

That supports Plaintiffs' contention in this appeal. Even if *Firestone* deference

applied to a fiduciary breach case such as this, it would not apply under the facts of

this case because the document establishing the plan grants only the EBC

interpretative discretion. *See* Plaintiffs' Br. 35 n.5; ABB Br. 24; ASA229 (§3.12),

ASA225 (§3.3). ABB is asking for deference to Mr. Cutler's interpretation of the IPS

when he is not even a member of the EBC. *Id.* ABB does not even point to a

document analogous to the SPD in *Ringwald* that purported to grant Mr. Cutler

discretion to interpret the IPS. Thus, Mr. Cutler's interpretation would be entitled

to no deference even under *Firestone* and *Ringwald.*

For these reasons, *Ringwald* is not supplemental authority in support of ABB's

appeal.

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                              Respectfully submitted,

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                       CERTIFICATE OF SERVICE

I hereby certify that on September 24, 2013, I electronically filed the foregoing with
the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit
by using the CM/ECF system. I certify that all participants in the case are
registered CM/ECF users and that service will be accomplished by the CM/ECF
system.

/s/Jerome J. Schlichter
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